(3)

No. 91-615

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ALLIED-SIGNAL INC.,
as successor-in-interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITIONER'S REPLY BRIEF

PRENTISS WILLSON, JR.
Counsel of Record
HARRY R. JACOBS
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
(415) 677-7000

RONALD A. SINAIKIN
PAUL H. BROWNSTEIN
ALLIED-SIGNAL INC.
P.O. Box 1057
Morristown, NJ 07962

Counsel for Petitioner

TABLE OF AUTHORITIES

Page(s)

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-615

ALLIED-SIGNAL INC.,
as successor-in-interest to
The Bendix Corporation,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition does not deny that this case raises an issue of profound national significance regarding the constitutional limitations on the power of the states to tax multistate enterprises. It takes issue only with the other two points raised by Allied-Signal Inc. ("Allied-Signal") in its petition for certiorari—namely, that the decision below conflicts with the decisions of other state courts of last resort and that the decision below is incompatible with the controlling decisions of

this Court. Neither of Respondent's contentions can withstand analysis.

I. THE ALLEGED "UNIQUENESS" OF THE FACTS OF THIS CASE CANNOT OBSCURE THE CONFLICT IT CREATES WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT

Just a few months ago the New Jersey Attorney General joined a brief to this Court urging this Court to consider the issue raised by this case because this case created a conflict with the decisions of other state courts of last resort (*see* Petition for a Writ of Certiorari ("Pet.") at 13-14). He has now purportedly discovered that this case no longer creates such a conflict. The reason is that the case is allegedly "unique." Thus Respondent suggests that there is now no conflict with these other state court decisions "[i]n light of the unique record" of this case (Brief in Opposition ("Opp.") at 12), because it presents "a complex, unique set of facts" (Opp. at 14), and because "[t]he unique facts of this case" (Opp. at 17) make it "a fact-bound case not appropriate for plenary review."

Respondent's revised view of the case is little more than a smokescreen designed to obscure the clear conflict between the decision below and the decisions of other state supreme courts. Indeed, Respondent fails to explain how the decision below is any more "unique" or "fact-bound" than any of the other cases that routinely appear on this Court's docket for decision on the merits. Moreover, Respondent cannot conceal the sharp division between the highest courts of Virginia, Arkansas, Missouri, and Florida, on the one hand, and New Jersey, Maryland, and Colorado, on the other, as to the appropriate *legal standard* to apply in deciding cases that raise the same issue. *See* Pet. at 9-13.

In fact, even Respondent concedes that "Petitioner is correct that there are differences among state courts in their application of the unitary business principle." Opp. at 17. Those "differences" reflect an irreconcilable conflict that this Court should resolve.

State tax collectors who have prevailed in the state courts may understandably seek to defeat this Court's review of the merits by asserting that their case is "unique" and "fact-bound" and accordingly "not appropriate for plenary review." But there is nothing unique or fact-bound about this case. Unless the sky is to be the limit in the taxation of multistate corporations that undertake to grow by diversification, this case brings to the fore the most fundamental questions of principle. If the constitutional limitations enunciated by this Court are to continue to have meaning with respect to diversified multistate corporations, then this New Jersey judgment should be reversed.

II. THE DECISION BELOW IS INCOMPATIBLE WITH THE DECISIONS OF THIS COURT

Respondent's effort to reconcile the New Jersey Supreme Court's decision with this Court's decisions in *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation and Revenue Dep't.*, 458 U.S. 354 (1982), is unavailing. He seeks to distinguish the facts of those cases from the instant case while ignoring the fundamental principle for which those cases stand, namely, that the Court cannot "accept, consistently with recognized due process standards, a definition of a 'unitary business' that would permit nondomiciliary States to apportion and tax dividends '[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in

the taxing State.'" *ASARCO*, 458 U.S. at 327 (*quoting Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 442 (1980)).[1]

Nor can Respondent derive any comfort from *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983). The Court's decision in *Container* had nothing to do with the apportionability of income from a minority investment in another corporation and, in any event, was pointed out by the Court to be wholly "consistent" with *ASARCO* and *Woolworth*. 463 U.S. at 176 n.15. Indeed, *Container* lends powerful support to Petitioner's case by making it clear that the critical question regarding the apportionability of income is whether "the out-of-state activities of the purported 'unitary business' [are] related in some concrete way to the in-state activities," *id.* at 166, a standard that Bendix's relationship to ASARCO fails to meet.[2]

---

[1] The Court also held that this principle applied equally to capital gains, which are at issue here. *ASARCO*, 458 U.S. at 330; Pet. at 19.

[2] For this reason, Respondent's reliance on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989); Opp. at 21 n.*, is entirely misplaced. The issue in *Amerada Hess* was whether New Jersey could deny the nation's major integrated oil companies a deduction for federal Windfall Profit Taxes in computing their net income for New Jersey corporate income tax purposes. Since the taxpayers were concededly conducting a unitary business from wellhead to gas pump, *id.* at 73, their income was apportionable by New Jersey in any event, and the only question was whether a particular cost of earning admittedly taxable income had to be allowed as a deduction because the cost was allegedly incurred outside the state. The Court found that the costs of generating unitary income are *by definition* no less unitary than the income itself, *id.* at 74, because "the resulting net figure is still a unitary one." *Id.* Here, by contrast, Bendix's unitary business being conducted in New Jersey has nothing to do with its investment in ASARCO, except insofar as the court below

Footnote Continued ...

CONCLUSION

On October 7, 1991, shortly before Allied-Signal filed its petition for certiorari, this Court denied certiorari in No. 90-1852, *Virginia Dep't. of Taxation v. Corning Glass Works, Inc.*, 60 U.S.L.W. 3265, and subsequently, on November 12, the Court denied certiorari in No. 91-530, *Pledger v. Illinois Tool Works, Inc.*, 60 U.S.L.W. 3359. Needless to say, this Court knows—and the Bar can only surmise—the various reasons why certiorari was denied in those two cases. But we submit that a substantial contributing factor almost certainly was that in both *Corning* and *Illinois Tool Works*, it was evident that the highest state courts (respectively, Virginia and Arkansas) were correct in holding for non-taxability. In sharp contrast, as the petition for certiorari shows, here the Supreme Court of New Jersey is in square conflict with the results and reasoning of the Virginia and Arkansas courts (as well as in conflict with the decisions of other highest state courts); and, in addition, the Supreme Court of New Jersey is plainly wrong and is in conflict with

---

Footnote Continued from Previous Page

sought to tie the investment to New Jersey by reference to "the intangible nature of corporate operations." Pet. App. A at 18a. Respondent's vague invocations of Bendix's overall corporate strategy plainly do not amount to the "concrete" link that this Court has required before a nondomiciliary state may include income from a taxpayer's out-of-state investment activity in its apportionable tax base.

landmark decisions of this Court. For the reasons set forth in the petition for certiorari and the additional reasons in this reply, certiorari should be granted.

Dated: November 20, 1991

Respectfully submitted,

Prentiss Willson, Jr.
Counsel of Record
Harry R. Jacobs
Morrison & Foerster
345 California Street
San Francisco, CA 94104
(415) 677–7000

Ronald A. Sinaikin
Paul H. Brownstein
Allied-Signal Inc.
P.O. Box 1057
Morristown, NJ 07962

Counsel for Petitioner